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No. 279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ELSA W. DE WAGENKNECHT and N. V. EDMUND T. WAGENKNECHT's HANDEL MAATSCHAPPIJ, *Petitioners*,

v.

MRS. HUGO STINNES, SR., HERBERT BROWNELL, JR., Attorney General of the United States, and ATLANTIC ASSETS CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT MRS. HUGO STINNES, SR. IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is contained in its unreported Memorandum and Order filed February 23, 1956 (R. 136-138). The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 243 F. 2d 413, and is set out in the petition at pp. 21-29.

JURISDICTION

The basis for the jurisdiction of this Court is adequately stated in the petition.

QUESTION PRESENTED

This petition concerns a District Court order terminating the taking of a deposition. On appeal, the Court of Appeals concluded that "there was no abuse of discretion when the trial court granted the motion terminating the witness' deposition", and that "those cases which require a movant under Rule 30(d) to make a clear showing of annoyance, embarrassment, oppression or the like are satisfied by the facts in this record". Moreover the Court of Appeals added, after a summary of the factors in the case, that "it was clearly proper to terminate her cross-examination". The question presented is whether, on the particular facts, the Court of Appeals correctly concluded that there was no abuse of discretion in the District Court's termination order.

FEDERAL RULES INVOLVED

Rules 26, 27 and 30, Federal Rules of Civil Procedure, are set forth at pp. 29-33 of the petition.

STATEMENT

Mrs. Stimmes, a woman 82 years of age and in frail health, sought to perpetuate her own testimony, [illegible] respect to her pre-vesting ownership of certain property seized by the United States Government under the Trading with the Enemy Act, by means of an oral deposition before action, pursuant to the provisions of Rule 27(a), F.R.C.P. Her petition was granted on July 11, 1955, with the consent of all parties (R. 8).

Because of her age and infirmity,* Mrs. Stimmes' deposition was taken in Germany in sessions lasting some two and one-half hours per day. There were twenty-five such daily sessions between August 30 and October 16, 1955. Direct examination required three of these sessions and part of a fourth, and the Government's cross-examination required one of these sessions and parts of two others. The remaining nineteen-plus sessions were used by counsel for the petitioners herein. To express the matter differently, direct examination filled sixty-three pages of the transcript, the Government's cross-examination twenty-seven more, and petitioners' cross-examination covered two hundred sixty-five pages of transcript.

The termination of Mrs. Stimmes' deposition came about in two stages, as follows:

(1) As the cross-examination continued it became increasingly clear that Mrs. Stimmes' health was deteriorating (R. 394) and that counsel for the petitioners herein nevertheless proposed to continue examining her indefinitely (R. 394, 419, 420). Petitioners' counsel was cross-examining Mrs. Stimmes at Mrs. Stimmes' expense, pursuant to the provisions of the consent order of July 11, 1955. And, on September 21, 1955, petitioners' counsel filed a motion for additional security for the payment of his fees and expenses which indicated that he expected to continue the cross-examination for at least another month (R. 13). Accordingly, on September 26, 1955, Mrs. Stimmes' counsel moved under Rule 30(d) of the Federal

* In addition to "serious heart and circulation trouble", Mrs. Stimmes had been a chronic sufferer from duodenal and gastric ulcers for many years (R. 44, 45).

Rules of Civil Procedure for an order terminating her deposition upon the ground that her cross-examination was being conducted in such a manner as unreasonably to oppress her. The following day, after cross-examination by petitioners' counsel had continued for thirteen sessions and part of another, Mrs. Stinnes' doctor advised her to suspend testifying because of the adverse effect which the examination was having upon her health, and to return to the University Hospital in Hamburg, where she had previously been treated, for an examination by Dr. H. H. Berg, an ulcer specialist of world renown who had treated Mrs. Stinnes for some twenty-five years (R. 43, 44, 45).

At the hearing on the motion to terminate, Mrs. Stinnes' counsel presented a certificate of Dr. Berg stating that continued examination of Mrs. Stinnes would be "dangerous for health and life" and that the deposition should therefore be terminated as promptly as possible. The certificate also stated that continuance under medical supervision for a few short sessions would be preferable to postponing the examination to some time in the future because the knowledge that the deposition might be resumed would handicap treatment of the ulcers (R. 45, 46). Thereupon Judge Youngdahl ordered that the deposition be resumed at the hospital in Hamburg as soon as Mrs. Stinnes' health permitted and that it should continue until completed or until in the written opinion of Mrs. Stinnes' doctor its continuance would be unduly prejudicial to her health (R. 47-49). The order also directed that if Mrs. Stinnes' physican advised that the deposition could be continued only for a specified number of sessions, counsel for all parties should "undertake to reach an agreement effecting an equitable allocation

among them of the time so specified by petitioner's [Mrs. Stimmes'] physican, for her examination by each of them:" (R. 48).

Pursuant to Judge Youngdahl's order the deposition was resumed in Hamburg, Germany, at Mrs. Stimmes' bedside in the University Hospital on October 11, 1955 (R. 51, 506, 507). Dr. Berg attended the first session and gave it as his opinion that the deposition could not continue beyond five additional sessions without being unduly prejudicial to Mrs. Stimmes' health (R. 70, 71, 522). Thereafter Mrs. Stimmes' counsel suggested that an attempt be made to allocate the remaining time along the lines envisaged by Judge Youngdahl's order (R. 52, 522). Petitioners' counsel refused to agree to any allocation of time, however, and continued his cross-examination for all the remaining sessions (R. 54, 522, 523, 524). On October 16, 1955, after six sessions at Mrs. Stimmes' bedside during which petitioners' counsel had largely repeated earlier questioning, Dr. Berg ordered the examination stopped, certifying that in his opinion continuance would be unduly prejudicial to appellee's health (R. 72).

(2) Thereafter the motion for termination was recalendared, and after hearing the Court entered its further order on February 23, 1956, reading in pertinent part as follows:

> "The records and brief in this case have been examined with care. At the outset it should be noted that this court has already allowed oral examination of petitioner, who is over eighty-two years of age, to be resumed once on the understanding that it be discontinued when found by her physicen to be unduly prejudicial to her

health.[1] On October 12, 1955 her physican found that 'the questioning is detrimental to the patient's health, and if continued for too long a time, the stress caused by it could result in an urgent complication of the ulcer (perforation or hemorrhage).' Believing that the examining parties have had fair and ample opportunity to go into the matters in controversy despite difficult circumstances, and being of the opinion that further cross-examination of petitioner would be oppressive, the deposition will be terminated by the Court. If, as a consequence, the deposition is rendered incomplete, such fact may be called to the attention of the Court when it is offered in evidence, so that it may be evaluated properly.

"[1] The order of this Court, dated October 6, 1955, reads in pertinent part: 'ORDERED that: (2) The taking of the deposition of the petitioner upon oral examination be resumed at the Universitats-Krankenhaus Eppendorf, Hamburg, Federal Republic of Germany, as promptly after the entry of this Order as arrangements can be made therefore and petitioner's health permits, and shall continue there to be taken until counsel shall complete the same or until to continue to take the same would, in the written opinion of petitioner's physician be unduly prejudicial to the health of petitioner, whichever occurs first.'"

On appeal the Court of Appeals affirmed, holding that the District Court did not abuse its discretion in entering the termination order, that the requirements of Rule 30(d), F.R.C.P., for a showing of unreasonable annoyance, embarrassment or oppression were satisfied, that there had been fair and ample opportunity to cross-examine the witness, and in fact that the termination was "clearly proper".

REASONS FOR DENYING THE WRIT

The petition misconceives the nature and purpose of this Court's certiorari jurisdiction, in that it seeks to

have this Court exercise a *nisi prius* function. It makes no attempt to show that the decision below raises questions of general or public interest, but instead recites numerous points on which petitioners feel they have not examined Mrs. Stimmes sufficiently and in effect asks this Court to consider *de novo* whether, in the circumstances, it would have issued the termination order.*

Regardless of the adequacy of the petition, the case is in any event not an appropriate one for review by writ of certiorari because it involves no conflict or question of law which is of general or public interest. The petition's concession that termination of a deposition is within the discretion of the trial court (pp. 2-3), and its lengthy recital, unintelligible without reference to the complete deposition, of matters as to which petitioners desire further examination, convincingly show that this is essentially a fact case, of interest only to the immediate parties.**

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* The petition is cast, not in terms of a review of the Court of Appeals decision, but rather in terms of a direct re-review of the District Court decision. *Cf. Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923): "The [certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing".

** The petition hints (pp. 16-17) that termination of a deposition taken to perpetuate testimony presents a peculiar problem because the issues are unknown. This suggestion will not withstand a reading of Rule 27(a)(1), which requires that the petition disclose the subject matter of the expected action, the petitioner's interest therein, and the substance of the testimony expected to be elicited. The petition also suggests (pp. 3, 5) that the District Court abused its discretion by failing to postpone action on the motion to terminate. This completely ignores the finding, concurred in by both lower courts, that there had already been fair and ample opportunity to cross-examine, and in any event will not withstand a reading of Rule 30(d).

Moreover, the decisions below were clearly correct. Termination of a deposition is in the sound discretion of the District Court, *United States ex rel. Edelstein v. Brassell Sewing Mach. Co.*, 3 F.R.D. 87 (S.D.N.Y. 1943); *Walsh v. Pullman Co.*, 10 F.R.D. 77 (S.D.N.Y. 1948); *cf. East Bay Municipal Utility Dist. v. Kieffer*, 279 P. 178, 99 Cal. App. 240 (1929); *People v. Hightower*, 224 P. 110, 65 Cal. App. 331 (1924), and an abuse of discretion must be shown to warrant reversal. *Continental Bank Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 678 (1935); *Mecano, Ltd. v. Wanamaker*, 253 U.S. 136, 141 (1920); *Twachtman v. Connelly*, 106 F. 2d 501, 507 (6th Cir. 1939); *cf. East Bay Municipal Utility Dist. v. Kieffer, supra; Barnes v. Squier*, 193 Mass. 121, 78 N.E. 731 (1906); *People v. Becker*, 210 N.Y. 274, 104 N.E. 396 (1914); *Sturm v. Sturm*, 163 Atl. 5, 111 N.J. Eq. 579 (1932). The District Court based its termination order on twin findings that there had been fair and ample opportunity to examine and that further cross-examination would be oppressive. The Court of Appeals affirmed on both grounds. On the bare facts as to Mrs. Stimmes' health (e.g., the need to hospitalize her) and the duration of the examination (25 sessions, 4/5ths of them used by petitioners herein for cross-examination), the decisions of both courts can hardly be termed abusive of their discretion. The petition purports to recognize that it must make a showing of abuse of discretion. To this end it devotes itself to the single proposition that fair and ample opportunity to question was not had, completely ignoring the District Court's finding of oppression, confirmed by the Court of Appeals. Its theory appears to be that any order terminating a deposition taken to perpetuate testimony, over the objection of the examin-

ing party, must necessarily be an abuse of discretion because (1) Rule 30(d) does not apply to a perpetuation and therefore "oppressive" conduct is no ground for termination, and (2) only the parties can determine when fair and ample opportunity to question has been had. But the assertion (p. 6) that Rule 30(d) does not apply to a proceeding under Rule 27 flies in the face of the express language of Rule 27 (a)(3), which provides that depositions to perpetuate testimony are to be "taken in accordance with *these* rules". And the Court's power to determine when ample opportunity for examination has been had, where the parties cannot agree, would seem to be self-evident.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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